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In The

Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Curiae Christian Legal Society is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors.

Amicus Curiae Union of Orthodox Jewish Congregations of America is a nonprofit organization representing nearly 1,000 Orthodox Jewish congregations throughout the United States. Without reservation, *Amici*, Christian and Jew, join in this brief urging the juridical and moral imperative that religious speech and practice not be the object of intentional discrimination by government.

A more detailed statement of interest of *Amici* is set forth in the Appendix. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.[1]

STATEMENT OF THE CASE

This is a case about discrimination against religious expression and religious practice. Although this Court has affirmed, time and again, that government is not required – and, indeed, is not permitted – to single out religious speech or religious exercise for disadvantage, that is precisely what has happened in this case, and in two ways: *First*, the Milford Central School's Community Use Policy, adopted pursuant to New York statute, expressly prohibits "any individual or organization" from

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[1] Pursuant to Rule 37.6, *Amici* disclose that: (1) no counsel for a party authored this brief, in whole or in part; and (2) *Amicus* Christian Legal Society has applied for a grant from the Alliance Defense Fund to cover expenses in producing this brief. ADF is a 501(c)(3) organization with offices at 8960 E. Raintree Drive, Suite 300, Scottsdale, AZ 85260. ADF exercised no control over the content of this brief.

using school facilities for "religious purposes" (Pet. D2); and *second*, the application of the Policy invites government officials to devise and enforce a distinction between different forms of religious expression – between the discussion of morals and values from a religious viewpoint, on the one hand, and morals and values through religious instruction, on the other (Pet. A16, C15).

At the center of this matter is a public access policy that permits residents to use school facilities for "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public." Pet. A2-A3. Such policies make good sense and serve the common good. By opening public property to private groups, these policies support, in a neutral and non-intrusive way, the web of mediating institutions and voluntary associations – the "little platoons" of democracy – that is so essential to a diverse and thriving civil society.[2]

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[2] Richard John Neuhaus raises the moral, along with the juridical, importance of the public-forum issue that is before this Court:

> The civil public square is one in which different convictions about the common good are engaged within the bond of civility. The "common good" is – and we can never tire of making this point – unavoidably a moral concept, and that means the religiously grounded moral convictions of the American people cannot be excluded from the public square. . . . To exclude the deepest convictions of the people from the deliberation of how we ought to order our life together is tantamount to excluding the people from that deliberation, and that is the end of democracy.
>
> Richard John Neuhaus, *Civil Religion or Public Philosophy*, First Things 69, 72 (Dec. 2000).

That said, the Milford Use Policy falls short of its lofty potential in that it does not permit all "uses pertaining to the welfare of the community." Rather, it excludes from school premises all those who seek to promote the "welfare of the community" through activities that, in the minds of government officials, have "religious purposes." Pet. A3. Thus, the question here is whether "to exclude the Good News Club because it teaches morals and values from a Christian perspective constitutes unconstitutional viewpoint discrimination." Pet. A12. The answer to that question is "yes."

SUMMARY OF THE ARGUMENT

The parties agree that Milford's Community Use Policy creates a limited public forum. *See, e.g.*, Pet. A13 ("We think it clear that the Community Use Policy has created a limited public forum in the Milford school facilities."). And the parties agree that any content restrictions in such fora must be "viewpoint neutral" and constitutionally "reasonable." Pet. A14 & n.8 ("If the Club's use is not a 'religious use' but merely the teaching of morals from a religious viewpoint, . . . Milford's . . . Use Policy would be unconstitutional viewpoint discrimination."). The disagreement involves a building access policy that permits groups to use school facilities to "benefit the welfare of the community," to "promote the morals of children," and to "instruct in any branch of education, learning or the arts," but expressly excludes speakers whose purposes are "too religious" in the estimate of government officials.

This Policy, and the application of it in this case, are unconstitutional. Neither the opinion below, nor the Second Circuit's *Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997), on which the appeals court relied, can be reconciled with this Court's decisions in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Widmar v. Vincent*, 454 U.S. 263 (1981). *Amici* endorse fully the argument that Milford's Policy constitutes viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. *See, e.g.*, Pet. 16-20; Brief for *Amici Curiae*, the States of Alabama, *et al.*, in Support of Petition for Writ of Certiorari, at 2-12. Judge Jacobs, in dissent below, put the matter well: "When the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters[,]" Pet. A22, and "[w]henever public officials . . . evaluate private speech 'to discern [its] underlying philosophic assumptions respecting religious theory and belief,' the result is 'a denial of the right of free speech.' " Pet. A28 (*quoting Rosenberger*, 515 U.S. at 845).

Our goal in this brief *Amici Curiae* is to supplement Petitioners' powerful arguments under the Free Speech Clause with four additional points. *First*, the Second Circuit's attempt to identify a line between a discussion of "morals from a religious viewpoint," on the one hand, and "morals through religious instruction," on the other – between expression that is "too religious to be merely incidental" to secular subjects and expression that is "secular enough" – not only runs afoul of the Free Speech Clause but violates the Establishment and Free Exercise Clauses as well. Courts and other government officials have neither the competence nor the authority to identify

the point at which private expression crosses an imagined Rubicon of religiosity separating religious "viewpoints" on "secular" subjects – such as "morals" – from religious instruction, worship, or assertions that "morality" is in fact an inherently religious subject. To search for that line, and to police it, is to assume the task of enforcing a particular orthodoxy and to entangle government in matters from which it is constitutionally excluded. *See, e.g., Widmar*, 454 U.S. at 272 n.11 ("We agree . . . that the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.' . . . Initially, the University would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.' ") (citations omitted).[3]

Second, Milford's vague fear that treating the Good News Club like other community youth groups might send a "message" of exclusion to impressionable children is both groundless and irrelevant. In crediting this fear, and in concluding that Milford acted "reasonably" in

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[3] Although government may not discriminate against religious viewpoints in a limited public forum, and although government cannot constitutionally distinguish between "too religious" and "secular enough" religious expression, this does *not* mean that local school officials cannot maintain firm control over the use of school facilities. For example, a school could limit the use of its buildings to community youth organizations during weekday afternoons, from 3 to 6 p.m. Or, because of high demand, officials could limit all organizational use of school facilities to twice per month. Or, a school could close the forum altogether. Because the speaker and subject-matter classifications are neutral as to religion, the foregoing illustrations raise no constitutional problems.

using this fear as an excuse for excluding "religious instruction" from its facilities, the Second Circuit implicitly endorsed the mistaken premise that the Free Speech Clause and the Establishment Clause are somehow in "conflict" and that concern for the latter Clause thereby preempts the former. Given this premise, Milford's unfounded scruples about "offending" the Establishment Clause are said to warrant infringing on the free-speech rights of the Good News Club. This makes no sense. Because the Free Speech Clause prohibits government from discriminating against religious viewpoints, the Establishment Clause cannot logically require (or excuse) such discrimination. Rather than conflict, the Clauses work in an independent, but complimentary, fashion, each protecting religious freedom by limiting government.

Third, the Policy is facially unconstitutional because it excludes groups seeking to engage in religious worship and instruction – "religious purposes" – from public facilities while permitting others to use the facilities for non-religious purposes. Not only is this discriminatory treatment not required by the Establishment Clause, it is not permitted by the Free Exercise Clause. A policy that permits community groups to use public facilities for private activities that pertain to the "welfare of the community" but targets for exclusion those groups whose activities have "religious purposes," intentionally discriminates against, and is thereby censorious of, religious exercise.

Finally, and briefly, *Amici* emphasize that Milford's Policy, and its application here, are unconstitutional whether or not any government official opposed or

disagreed with the Club's message. In this area, the government does not need to act invidiously to act unconstitutionally.

ARGUMENT

I.

The First Amendment Does Not Permit Government Officials To Draw and Enforce Distinctions Between "Worship and Religious Instruction" and All Other Forms of Religious Speech

The Second Circuit held that government officials may, in the regulation of a limited public forum, distinguish religious instruction, prayer, and worship from "discussion of secular subjects such as child rearing, development of character, and development of morals from a religious perspective," Pet. A10, and may exclude the former while permitting the latter. Moreover, the appeals court was quite untroubled by the prospect of school officials engaging in the task of marking the metes 'n bounds of "worship" in America or divining the line between "religious purposes" and all other religious discussion. In the court's view, it is " 'not difficult for school authorities to make' the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious materials through religious instruction and prayer." Pet. A16 (*quoting Bronx Household*, 127 F.3d at 215). *Accord Campbell v. St. Tammany Parish School Board*, 2000 WL 1597749, at *4 (5th Cir. 2000) (*per curiam*) (*denying rehearing en banc*) ("A religious service is an activity, a manner of communicating which carries a very special and distinct meaning in our culture. While a service may express a religious viewpoint, for

example, a Catholic mass featuring a prayer for the welfare of the unborn and for the reform of American abortion law, the distinction is between medium and message. . . . [T]hus, a Catholic group could assemble on school property to discuss a Christian anti-abortion viewpoint and distribute . . . material advocating a Christian anti-abortion viewpoint. They would only run afoul of the policy if they also chose to conduct religious services.").

The appeals court was mistaken. It *is* difficult for minor local officials to make this distinction, and impossible for them to make it without engaging in constitutionally forbidden theologizing.[4] To do so, these officials must scrutinize not only the character of a religious group but also the nature of that group's planned expression, programs, and activities. Their inquiry is necessarily complicated by our Nation's ethnic and geopolitical diversity – *e.g.*, school districts, large and small, are inner-city, suburban, and rural – and by the Nation's unique combination of high religiosity and increasing religious pluralism. What strikes one minor official as "religious" or "secular" will inevitably vary from place to place and from person to person. What will seem "too

[4] The difficulty can be illustrated in the case of Jewish youth groups should they engage in the study of morals and good character. From the traditional Jewish perspective, the study of the Bible or the Talmud is viewed as both an intellectual and a devotional exercise to the point that a blessing is made prior to the study of Torah. *See* THE COMPLETE ARTSCROLL SIDDUR 18 (1985). Thus, if an access policy permitted the study of morals from a religious perspective but not worship, local officials would have to make a theologically based distinction between Jewish youth groups – excluded because of the devotional or prayer – and all others, including other religion-based youth groups.

religious" to one school employee – because of variations in background, experience, religious devotion, or lack thereof – strike another as "incidental to worship or secular enough."

Thankfully, though, the line drawn by Milford is one that the Establishment Clause does not permit, let alone require. Nearly twenty years ago, when a dissenting opinion urged a distinction between "religious worship" and other forms of religious expression, an eight-Justice majority of this Court refused, observing that "the distinction [lacked] intelligible content," that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer," and that, in any event, the proposed distinction was constitutionally irrelevant. *Widmar*, 454 U.S. at 269 n.6 (1981). Indeed, the *Widmar* majority stated that the proposed categorization of religious expression was not only unintelligible and unnecessary, it was unconstitutional. *Id.* ("Merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases."); *see also id.* at 271 n.9, 272 n.11.

A. The Establishment Clause Does Not Permit Officials To Classify Per Religious Categories Religious Words, Practices, And Events.

Milford's Policy prohibits the use of school buildings by community groups for "religious purposes," including "worship" and "religious instruction" (Pet. A9, A10). Thus, the Policy requires local officials to keep out "praise songs or biblical lessons," for example, while permitting discussions of "otherwise secular subject[s]"

from a religious perspective. This kind of screening inevitably embroils educational employees in the messy business of testing private expression for undue religiosity, and purging excessively devout, or insufficiently inclusive, expression. And, invariably, the Policy's invitation to petty officials to separate the "too religious" from the "secular enough" requires government – including, eventually, the courts – to investigate, probe, and dissect the nature and practices of community-based youth organizations, to glean these practices' religious significance, and to ascribe spiritual meaning (or lack thereof) to private actors' words and activities. But, of course, for a court to conclude that a particular form of expression or subject of discussion has (or lacks) metaphysical meaning is to make determinations that are religious.

In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court faced an ordinance that was, in a sense, the reverse of the Milford Policy. In *Fowler*, a city permitted churches and similar religious bodies to conduct worship services in its parks, but religious meetings were excluded. The ordinance resulted in the arrest of a Jehovah's Witness as he conducted a peaceful meeting. Justice Douglas, in an opinion from which no Justice dissented, overturned the conviction because the distinction between "worship" and an "address" on religion was inherently a religious question and invited discrimination:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. . . . Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Id. at 69-70. Officials in Milford are no more competent to include a "religious perspective" but exclude "worship" than were the officials in *Fowler* competent to include worship while excluding a religious address. Both efforts entangle government in theological classification, and both invite covert religious bigotry.

Inquiries by government functionaries into the spiritual significance of a religious organization's programs and solemn observances undermine an important aim of the separation of church and state, namely, keeping government within its sphere of competence, to the purpose of maintaining both the legitimacy of the state and the integrity of religion.[5] It is for this reason that this Court has consistently, and quite sensibly, refused to permit government officials to classify per religious categories a

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[5] William Clancy summarizes well the settlement of church/state relations in America:

> [T]he "wall of separation" metaphor is an unfortunate and inexact description of the American Church-State situation. What we have constitutionally is not a "wall" but a logical distinction between two orders of competence. Caesar recognizes that he is only Caesar and foreswears any attempt to demand what is God's. (Surely this is one of history's more encouraging examples of secular modesty.) The State realistically admits that there are severe limits on its authority and leaves the churches free to perform their work in society.

William Clancy, *Religion as a Source of Tension*, *in* RELIGION AND THE FREE SOCIETY 23, 27-28 (1958).

religious organization's words, practices, and events.[6] Similar concerns, and a similar recognition of government's lack of competence in theological matters, have animated those decisions holding that the courts lack subject-matter jurisdiction over intra-church disputes involving religious questions.[7] Indeed, judicial

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[6] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 844-45 (1995) (cautioning a state university to avoid having to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring) (same); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice is desirable); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 271 n.9, 272 n.11 (1981) (holding that inquiries into significance of religious words or events are to be avoided); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); *see Cantwell v. Connecticut*, 310 U.S. 296, 305-07 (1940) (stating that petty officials are not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit).

[7] This Court has said that it lacks jurisdiction over most disputes concerning church property, doctrine, ecclesiastical policy, the selection or promotion of clergy and ministers, and dismissal from church membership. *See, e.g., Serbian East. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976) (courts may not probe into church polity); *Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970) (*per curiam*) (courts should avoid doctrinal disputes); *Presbyterian Church v. Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (civil courts are forbidden to interpret and weigh church doctrine); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190,

forbearance about overstepping bounds extends to all civil and criminal litigation – intra-religious or not – that turns on matters of faith, whether these cases involve claims sounding in tort,[8] breach of contract,[9]

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191 (1960) (*per curiam*) (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952) (First Amendment prevents legislature from interfering in ecclesiastical governance of Russian Orthodox Church); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725-33 (1872) (rejecting implied trust rule because of its departure-from-doctrine inquiry).

[8] *See, e.g., Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp.2d 732, 736-42 (D.N.J. 1999) (dismissing, for lack of subject-matter jurisdiction, libel and slander claim filed against rabbinic association); *Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1288-90 (D. Minn. 1993) (dismissing defamation action against church where the offensive statements arose out of church controversy); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 811-13 (Md. Ct. Spec. App. 1996) (holding that trial court lacked subject-matter jurisdiction over defamation claim against church hierarchy); *Gibson v. Brewer*, 952 S.W.2d 239, 247-48 (Mo. 1997) (dismissing claim against Roman Catholic Diocese for negligent supervision of priest); *Tidman v. Salvation Army*, 1998 WL 391765, *5-7 (Tenn. Ct. App. 1998) (dismissing invasion of privacy and outrageous conduct tort claims brought by former employees of faith-based organization discharged for having extramarital affair); *In re Pleasant Glande Assembly of God*, 991 S.W.2d 85, 88-90 (Tex. App. 1998) (subject-matter dismissal of negligence claims by parishioner brought against church and youth pastor); *Korean Presbyterian Church v. Lee*, 880 P.2d 565, 568-70 (Wash. Ct. App. 1994) (holding that ecclesiastical abstention doctrine precluded recovery for tort of outrage); *L.L.N. v. Clauder*, 563 N.W.2d 434, 440-45 (Wis. 1997) (holding that the First Amendment prohibited negligent supervision claim).

[9] *See, e.g., Gabriel v. Immanuel Evangelical Lutheran Church, Inc.*, 640 N.E.2d 681, 683-84 (Ill. App. Ct. 1994) (holding that

civil-rights and employment legislation,[10] or criminal fraud.[11]

Similar caution is warranted here. After all, judge-made classifications of expression along the lines of

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breach of contract complaint was properly dismissed on First Amendment grounds since the matter of whether to employ plaintiff as a parochial school teacher was an ecclesiastical issue into which civil court may not inquire); *McEnroy v. St. Meinrad School of Theology*, 713 N.E.2d 334, 336-37 (Ind. App. 1999) (subject-matter jurisdiction dismissal of breach of employment contract claim brought by professor of theology against seminary); *Basich v. Board of Pensions*, 540 N.W.2d 82 , 85-88 (Minn. Ct. App. 1995) (holding that First Amendment prevented district court from exercising jurisdiction over action for breach of pension contract and breach of fiduciary duty); *Pearson v. Church of God*, 458 S.E.2d 68, 71-72 (S.C. Ct. App. 1995) (holding that trial court did not have constitutional authority to decide claim for breach of contract); *Smith v. Clark*, 709 N.Y.S.2d 354, 357-59 (Sup. Ct. 2000) (dismissing claim against church for breach of employment contract because courts lack subject-matter jurisdiction over questions of religious doctrine).

[10] *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464-67 (D.C. Cir. 1996) (finding EEOC investigation into faculty member's gender discrimination Title VII claim lodged by Catholic nun at religious university was barred by Establishment Clause); *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 707-09 (N.D. Cal. 1995) (holding that minister's Title VII retaliation claim should be dismissed based on excessive governmental entanglement with religion in violation of Establishment Clause); *Van Osdol v. Vogt*, 908 P.2d 1122, 1131-33 (Colo. 1996) (holding that Establishment Clause insulated a religious institution's choice of minister from judicial review; *Geraci v. Eckankar*, 526 N.W.2d 391, 399-400 (Minn. Ct. App. 1995) (gender discrimination claim by pastor against her church is barred by Establishment Clause).

[11] *United States v. Ballard*, 322 U.S. 78, 86 (1944) (holding that in trial for mail fraud, the truth or falsity of a religious belief or profession may not be subjected to scrutiny by a jury).

"worship and religious instruction" versus "religious speech on secular subjects" are no less hazardous to administer than those that this Court has refused to draw in these other contexts. There is simply no way to avoid the fact that theologically "liberal" or latitudinarian private speech will often appear to minor local officials as "secular enough," and thus acceptable in school facilities, whereas theologically "conservative" or orthodox organizations will more likely be regarded as "too sectarian," and thus deserving of exclusion from public spaces.[12] This kind of unequal treatment is a paradigmatic violation of the First Amendment. *Larson v. Valente*, 456 U.S.

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[12] It is increasingly recognized that, when it comes to religion and public life, the significant distinctions no longer track the denominational lines separating Protestants, Catholics, Jews, and Muslims. Instead, religious believers are more meaningfully categorized as traditional or "orthodox" (whether Protestant, Catholic, Jewish, or Muslim) and theologically liberal or "progressive" (whether Protestant, Catholic, Jewish, or Muslim). *See* James Davison Hunter, Culture Wars: The Struggle to Define America 42-46 (1991). Professor Hunter explains that orthodox believers are devoted "to an essential, definable, and transcendent authority," whereas progressives "resymbolize historic faiths according to the prevailing assumptions of contemporary life." The latter type of religious organizations, those most willing to conform to contemporary culture, will, unsurprisingly, appear less "religious" or sectarian to government officials, while those who are more conservative in their theology and who have resisted acculturation will appear more sectarian. Clearly, though, to exclude from public spaces and forums – even "limited public forums" – those groups that are more traditional, and that are less able to cast themselves as having only a "viewpoint" on "secular" questions, is to punish those religions that resist conforming to contemporary culture while rewarding those religions willing to mirror secular culture.

228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). A more discriminatory rule than one that privileges some theological traditions over others could hardly be devised.

B. The Free Exercise Clause Also Denies Government Officials Authority To Interpret the Religious Meaning of Religious Practices.

The foregoing is well established Establishment Clause doctrine. But this Court has also rebuffed government efforts to decide religious questions, or to interfere in religious affairs, in Free Exercise Clause cases. For example, this Court has made clear that religious beliefs and practices are constitutionally protected whether or not they are "central" to a religious person's faith.[13] This is because, again, public officials are simply not competent to decide which practices are at the "core" of a particular religious tradition and which are peripheral. For similar reasons, religious doubters and backsliders are protected by the Free Exercise Clause no less than

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[13] *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' "); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-51, 457-58 (1988) (rejecting Free Exercise Clause test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance").

those who are orthodox or firm in their faith.[14] Here too, the cases reflect the fundamental insight that civil officials have no juridically intelligible means for resolving doctrinal disputes, or gauging the degree of a claimant's religious fervency, or identifying theologically correct positions. As this Court has observed, "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."[15]

C. The Milford Use Policy Embroils School Officials in Unconstitutional Line-Drawing.

The "too religious/secular enough" test invited by the Milford Policy, and applied by the court below, casts

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[14] *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) ("Courts are not arbiters of religious interpretation.").

[15] *Thomas*, 450 U.S. at 716. *See also Smith*, 494 U.S. at 887 ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"); *Lyng*, 485 U.S. at 457-58 ("[T]he dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play."); *Lee*, 455 U.S. at 257 ("It is not within the judicial function and judicial competence . . . to determine whether appellee or the Government has the proper interpretation of the Amish faith; [c]ourts are not arbiters of scriptural interpretation.") (citations and quotation marks omitted); *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) (rejecting non-preferentialism because its application "invite[s] the courts to engage in comparative theology"); *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (observing that courts are "ill equipped to sit as a national theology board").

school employees adrift in the same uncharted waters as would tackling the questions that this Court has consistently avoided in a wide range of First Amendment cases. We emphasize, however, that the problem here is not that government officials are simply interacting with religious organizations. Some regulatory interaction – indeed, some adjustments and cooperation – between government and religious organizations is inevitable, given that government keeps getting bigger and society more complex. Indeed, such interaction can on occasion be mutually beneficial. After all, religious institutions have always played a vital role in promoting the common good, in delivering health care and in administering charitable programs, often in collaboration with government. Thus, *Amici's* argument here is not that the inevitable and unremarkable regulation that affects the operation of religious organizations necessarily invades the "privacy" of religious groups. Rather, we object to a government effort to exceed its constitutionally limited powers by adjudicating subject matters reserved to the sole cognizance of religion and religious organizations[16] – matters that were,

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[16] Professor Max L. Stackhouse notes just how remarkable was the American church/state settlement in that a government should go beyond the protection of the personal free-exercise rights of individuals and to limit its sovereignty by acknowledging another center of competence when it comes to matters of spiritual cognizance:

> [The first] amendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself. . . . However much government may become involved in regulating various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society, religion is an arena that, when it is doing its own thing, is off limits. This not only an affirmation of the freedom of individual belief or practice, not only an acknowledgment that the state is noncompetent when it comes to theology, it is the recognition of a sacred domain that no secular authority can fully control. Practically, this means that at least one association may be brought into being in society that has a sovereignty beyond the control of government.

Max L. Stackhouse, *Religion, Rights, and the Constitution*, *in* AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds. 1990). As Professor Stephen Carter has observed, government is invariably tempted to regulate, and reduce the influence of, religion, precisely because religious faith posits a separate and higher authority than that of the state, and is therefore subversive of the state's excessive ambitions. *See generally*, STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE RIGHTS AND WRONGS OF RELIGION IN POLITICS (2000).

using Professor Rakove's apt term, "deregulated" at the Nation's founding.[17]

School officials are not competent to scour the organic charters, programs, lesson books, songs, games, and planned expression of community-based groups, such as the Good News Club, for evidence of excessive religiosity. But the Milford Policy requires exactly this kind of administrative – and eventually judicial – inquiry into the mission and motivations of the "too religious" organizations, so as to separate them from the "mostly

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[17] *See* Jack N. Rakove, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 311-12 (1997) ("[A]t the heart of [Madison's and Jefferson's] support for disestablishment and free exercise lay the radical conviction that nearly the entire sphere of religious practice could be safely deregulated, [and] placed beyond the cognizance of the state[.]").

secular" organizations. Such bureaucratic rummaging might well uncover all kinds of religion-related "facts," but local school officials – and they will be the first to admit as much – lack the training, experience, and theological insight to determine the significance of these facts. To invite petty officials to engage in this kind of inquiry and religious classificaton can only lead to misunderstanding, insensitivity, and even outright sectarian bigotry.[18]

II.

The Establishment Clause Cannot Supply the "Compelling Governmental Interest" Required To Preempt the Free Speech Clause

Although the Second Circuit asserted that it was "eminently reasonable" to exclude the Good News Club from Milford facilities (Pet. A15), the court did not hold that the Establishment Clause justified or required this exclusion. However, in its Brief in Opposition to the Petition for a Writ of Certiorari, Respondent advanced precisely this claim. *See, e.g.*, Opp. 9 ("Petitioner's intended use of Respondent's facilities violates the First and Fourteenth Amendments by forcing Respondent to endorse Christianity over all other religions and over no religion at all.").

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[18] Respondent and its *amici* may contend that the dangers of entangling local officials in the workings of religious groups is an argument for "stricter separation" of religion and government and thus for disallowing the use of after-school facilities by religious groups for any purpose whatsoever. But that course was rejected by this Court, and properly so, at least as far back as its decision in *Widmar v. Vincent*, 454 U.S. 263 (1981).

This argument should be rejected, as should its premise, namely, that compliance with the restraints of the Establishment Clause supplies the "compelling governmental interest" to trump what would otherwise be a violation of the Free Speech Clause. This "conflict-between-the-Clauses" makes no sense.

During the last twenty years, this Court has held consistently that religious expression by private individuals is entitled to the same protection afforded political, artistic, and educational expression.[19] In many of these cases, those seeking restrictions on religious speech painted a picture of conflicting First Amendment Clauses: a right under the Free Speech Clause to religious expression without discrimination, on the one hand, and an Establishment Clause command that government not aid religion by permitting use of public property, on the other. Having framed the issue this way, these litigants invited this Court to "balance" the Clauses' commands and to suppress the private speech.

In *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), for example, the State of Ohio had

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[19] *Rosenberger*, 515 U.S. at 830-32 (1995) (finding viewpoint discrimination in university's denial of printing costs for student-initiated religious publication); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-63 (1995) (finding content-based discrimination against religious speech in public forum not justified by Establishment Clause); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (finding viewpoint discrimination against religious speech); *Widmar*, 454 U.S. at 267-70 (1981) (finding content discrimination against religious speech); *see Westside Bd. of Educ. v. Mergens*, 496 U.S. 226, 247-53 (1990) (plurality op.) (holding that the Equal Access Act, which prohibits discrimination against religious speech at secondary schools, does not violate the Establishment Clause).

created a public forum by allowing citizens to erect temporary displays symbolizing each group's message. But when the Ku Klux Klan sought permission to erect a Latin cross during the Christmas season, state officials balked. The Klan then sued to vindicate its free-speech rights. This Court rejected the state's argument that the Establishment Clause justified or required silencing the Klan's speech. Because the Establishment Clause was not violated by the presence of the cross, the state was ordered to permit the religious display on the same basis as all other citizen displays. *Id.* at 762-70.

Although the *Pinette* Court re-affirmed that private religious speech is protected by the Free Speech Clause from discrimination, in *dicta* it also indicated that, in another case presenting different facts, the Establishment Clause might well require the suppression of private religious speech. *Id.* at 761-62. This makes no sense, and this Court should reject any invitation to use the Establishment Clause as a sword driving private religious expression from the marketplace of ideas.

First, even if there were a "clash" between the Establishment Clause and the Free Speech Clause – and it is not – why resolve the conflict by tipping the "balance" in favor of no-establishment? The courts could just as easily – and no less arbitrarily – conclude that the duty to comply with the Free Speech Clause requires cutting back on no-establishment. There is no principled way for courts to rank order the protections in the First Amendment, or to award no-establishment a better place in line than free speech or vice versa.[20] There is, however, the

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[20] *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of

real danger that judges – who are not hostile to religion so much as they are without expertise in the subject – will more often than not "balance" matters in a way that either misunderstands or trivializes matters of faith.

Second, the Clauses are not in conflict. Neither the Free Speech Clause nor the Establishment Clause, when ratified in 1791, delegated new powers to Congress (or, for that matter, the Executive or Judiciary).[21] Quite the contrary: these provisions limited those powers previously granted. That is, the Free Speech Clause and the Establishment Clause are both "negatives" on, or subtractions from, the government's power. While the Clauses can overlap and reinforce one another, two "negatives" on governmental power can never logically conflict.

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constitutional values . . . to invoke the judicial power of the United States.") (footnote omitted).

[21] In *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), the Supreme Court observed:

> The preamble to the [congressional] resolution submitting [the Bill of Rights to the States] for adoption recited that the "conventions of a number of the states had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of [federal] powers, that further declaratory and *restrictive* clauses should be added." . . . Most of [the proposed] amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

Id. at 535 (emphasis in original). The Preamble in its entirety is reproduced at 5 THE FOUNDERS' CONSTITUTION 40-41 (Philip B. Kurland & Ralph Lerner, eds. 1987).

Third, the Establishment Clause restrains government and government alone. Private actors cannot violate the Clause, because it does not regulate their conduct or expression. Thus, in any free speech case involving religion, the first question to ask is whether the speech in question is government speech or private speech. If the speech is government speech (or private speech adopted by the government),[22] and its content is inherently religious, then – clearly – the Establishment Clause prohibits the speech. This is borne out in the case law dealing with school prayer, devotional Bible reading in school, teaching the biblical account of creation as science, civic veneration of the Ten Commandments, and the like.[23]

On the other hand, not only is private speech not restrained by the Establishment Clause, the Free Speech and Free Exercise Clauses affirmatively protect the speech. *See, e.g., Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.) ("[T]here is a crucial difference between

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[22] We realize that it is sometimes hard to tell whether the speech of a private individual has been adopted by the government as its own. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2279 (2000) (striking down school policy of conducting student election on whether to have prayer at football games delivered by elected student speaker). That said, courts confronted with cases of mixed government/private speech should not aim to suppress the private speech but should instead enjoin only those governmental actions that adopt the private religious message.

[23] *See generally, e.g., Santa Fe Indep. Sch. Dist., supra; Lee v. Weisman, supra; Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

government speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original).

Logically there can be no "conflict-in-the-Clauses." Instead, the various Clauses work together to safeguard religious freedom by protecting private expression while restraining government coercion and intrusion into religious matters.

III.

The Use Policy Intentionally Discriminates On the Basis of Religion and Therefore Violates the Free Exercise Clause

Milford insists it must exclude "worship and religious instruction" from the limited public forum. The discrimination is required, Milford contends, either by reason of the Establishment Clause or simply to honor the community's desire for a clear demarcation between church and state. *See, e.g.*, Brief in Opp. 9 ("Petitioners' intended use of Respondent's facilities violates the First and Fourteenth Amendments by forcing Respondent to endorse Christianity over all other religions and over no religion at all."). This cannot be the law, for both of these rationalizations are at odds with the Free Exercise Clause. The Free Exercise Clause prohibits intentional discrimination by government against a particular religion or religion in general,[24] as well as discrimination that disfavors

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[24] *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (striking down ordinances that intentionally discriminated against Santeria religious practice); *Smith*, 494 U.S. at 877 (government "may not . . . impose special disabilities on the basis of religious views or religious status"); *McDaniel v.*

particular religious practices.[25] Milford's policy excludes speech and related practices thought by school officials to be "worship or religious instruction" and is therefore a textbook example of intentional discrimination. Accordingly, the Policy can be justified only upon a showing that the burden is necessary to satisfy a compelling governmental interest.

The Second Circuit did not consider whether the Policy violated the Free Exercise Clause. The free-exercise question, of course, had already been foreclosed by the decision in *Bronx Household, supra*. In that case, the Second Circuit held that the discrimination in the New York statute did not make out a prima facie case under the Free Exercise Clause:

> [The speech exclusion did] not bar any particular religious practice. [It does] not interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion. The members of the Church here are free to practice their religion, albeit in a location separate from [the school building.] "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. That right

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Paty, 435 U.S. 618, 626 (1978) (striking down state constitutional clause that intentionally discriminated against clerics seeking public office).

[25] The Free Exercise Clause prohibits more than just intentional discrimination on the basis of religion or religious affiliation. The Clause also prohibits intentional discrimination on the basis of a particular religious belief or practice. Government may not "impose special disabilities on the basis of religious views or religious status," *Smith*, 494 U.S. at 877, or regulate the conduct of slaughter of small animals "because it is undertaken for religious reasons," *Lukumi*, 508 U.S. at 532.

> has not been taken from the members of the Church.

Id. at 216. In other words, in the view of the *Bronx Household* panel, so long as the school does not ban a religious practice at all times and all places, the school is free and clear. It would mean the Clause prevents nothing short of a national effort to outlaw a religious group or a campaign to completely ban a central tenet of the faith. Such a rule would drain the Free Exercise Clause of all meaning.[26] The government will not be heard to say a citizen has no First Amendment right merely because the right can be exercised at another time or place free of molesting officials.[27]

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[26] Admittedly, the Free Exercise Clause does not grant *more* than equal rights for religious expression. *Heffron v. International Soc'y of Krishna Consciousness*, 452 U.S. 640, 652-53 (1981) (dealing with solicitation on state fair grounds). But the Free Exercise and Free Speech Clauses *do* require no less than equal treatment for religious speech. This is not to collapse the two Clauses into one. The Free Exercise Clause has an independent reach of its own, namely, the protection of religiously inspired *action*. This point was succinctly stated by Justice White in *Welsh v. United States*, 398 U.S. 333 (1970):

> It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech.

Id. at 372 (dissenting opinion).

[27] *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 541 n.10 (1980) (observing that this Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative

IV.

That School Officials Had No Animus Toward the Good News Club Or Its Message Is Irrelevant

Neither the Second Circuit nor the District Court considered the motives of the officials who adopted and applied Milford's Policy, and Petitioner did not allege bad faith or invidious intent on Milford's part. Still, in light of the Fifth Circuit's recent *per curiam* order denying rehearing *en banc* in *Campbell v. St. Tammany Parish School Board*, *supra*, it is worth emphasizing that no such proof is required.

Campbell involved a challenge to a school policy similar to the one at issue here. St. Tammany's policy permitted "civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community" but excluded "religious services or religious instruction." *Id.* 2000 WL 1597749 at *1; *see also Campbell v. St. Tammany's School Board*, 206 F.3d 482, 484 (5th Cir. 2000). In its *per curiam* opinion, the Fifth Circuit insisted that the policy "is not viewpoint discriminatory," 2000 WL 1597749 at *3, relying on the same distinction employed by the Second Circuit "between prohibiting religious services and prohibiting expression from a religious viewpoint[,]" *id.* at *4; *see also* 206 F.3d at 487 ("Religion may be either a perspective on a topic such as marriage or may be a substantive activity in itself.").[28]

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means of expression"); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[28] The Fifth Circuit was unmoved by this Court's decision to grant *certiorari* in this case, although, interestingly, in distinguishing the case before it from this one, it observed that

Indeed, the Fifth Circuit asserted that "[t]he policy's express tolerance of discussion from a religious viewpoint rebuts any inference of viewpoint discrimination." 2000 WL 1597749 at *3.[29]

Again, like the Second Circuit below, the court in *Campbell* was confident that the policy was "supported by rational reasons[.]" *Id.* It added, however, that "[e]specially where, as here, the school district has affirmative evidence that its motive was not viewpoint discrimination, such reasons need only be rational." *Id.*; *see also id.* at *5 ("[T]here is no evidence that [the Parish's] efforts to create a limited public forum or its application of its rules are a pretext for viewpoint-based discrimination."), *id.* at * 3 n.19 ("The provisions of St. Tammany's policy that expressly permit discussion of religious viewpoints provide affirmative evidence that the policy is not driven by viewpoint discrimination.").

The Fifth Circuit was mistaken when it suggested in *Campbell* that a failure to allege or prove invidious motive behind the discrimination prejudiced the claim that the

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"[t]here is a powerful argument that such a prohibition [as the one against "religious purposes" contained in the Milford Use Policy] is facially invalid as inevitably presenting viewpoint discrimination." 2000 WL 1597749 *5.

[29] Like the appeals court below, the Fifth Circuit missed the point entirely. It is *precisely* by insisting that a meaningful distinction can be drawn between "discussion from a religious viewpoint" and more overtly religious, and therefore unwelcome, expression that the St. Tammany Policy and the Milford Policy discriminate against a particular viewpoint, *i.e.*, the viewpoint that questions of morality, character, and meaning are *inherently* religious subjects and that discussions about such subjects are either religious or nonsensical. No one suggests that the government has to agree with this viewpoint, but it may not discriminate against it.

policy violated the Free Speech Clause. As this Court observed in *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1991), the controlling cases "have consistently held that '[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment.' . . . [A plaintiff] need adduce 'no evidence of an improper censorial motive.' . . . As we [have] concluded [elsewhere]: 'We have long recognized that even regulations aimed at proper government concerns can restrict unduly the exercise of rights protected by the First Amendment.' " *Id.* at 117 (citations omitted). By the same token, this Court should not treat Milford's presumed good faith in drafting and applying its Policy as being relevant to Petitioner's argument that Milford's Policy is unconstitutional.

CONCLUSION

For all the foregoing reasons, *Amici* urge this Court to reverse the judgment of the court below.

Respectfully submitted,

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APPENDIX

Statements of Interest of *Amici*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 145 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked to safeguard religious belief and practice, as well as preserving the autonomy of religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to protect religious exercise in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interaction of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the U.S. Supreme Court involving church/state relations.

The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute

for Public Affairs, the U.O.J.C.A. researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The U.O.J.C.A. has filed, or joined in filing, briefs with this Court in many of the important cases which affect the Jewish community and American society at large.

Of particular relevance to this case, the U.O.J.C.A. is the parent organization of the National Conference of Synagogue Youth ("NCSY"). One of the world's most successful Jewish youth movements, NCSY provides educational, religious and social programming for over 40,000 American teenagers annually through weekend retreats, summer trips and after-school clubs. NCSY's mission is one that is religious, but invites any Jewish teen, regardless of their level of affiliation or observance, to participate. Clearly, this case will have a substantial impact upon the ability of NCSY to serve high school students throughout the United States; it will determine what elements of Jewish tradition and thought NCSY may include in its after-school programming should it wish to conduct such programming on public school grounds.

But the significance of this case to the American Orthodox Jewish community goes beyond the realm of youth programming to the ability of our community to grow and flourish for our adults as well. Due to the centrality of communal prayer in Jewish life, Jewish communities invariably have a synagogue at their center. Each morning and evening, Jews gather for daily prayers and each Saturday we gather for weekly Sabbath prayers. A unique feature of Sabbath observance for Orthodox

Jews is to desist from using modern forms of transportation such as cars, buses and trains. Thus, for Orthodox Jews to be able to gather for communal prayers on the Sabbath, a meeting place for such groups must be present within walking distance of any community in order for it to enjoy the fullness of its religious observances. Thanks to the freedoms enjoyed by citizens of this nation, the Orthodox Jewish community is the fastest growing segment of the American Jewish population with an acute need to expand or found new communities. The ability to rent facilities, such as geographically convenient public schools, is necessary for nascent communities to expand or grow to the point where they can undertake the construction of a new synagogue.

U.O.J.C.A. is supporting the Petitioners because it believes that New York Education Law § 414 is a roadblock to the Orthodox Jewish community's full enjoyment of its constitutional rights. U.O.J.C.A. believes that the limited forum doctrine may not be used to support viewpoint-based discrimination against religious speech and that the Establishment Clause may not be raised as a defense for what is essentially religious discrimination.